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Appropriations Committee
February 11, 2008

[AGENCY11]

SENATOR HEIDEMANN: Is there anyone else wishing to testify on Agency 5, the Supreme Court? Seeing none, we will close the public hearing on Agency 5 and open up the public hearing on Agency 11, the Attorney General. [AGENCY5]

JON BRUNING: Hello, Mr. Chairman. [AGENCY11]

SENATOR HEIDEMANN: Sure, go ahead. [AGENCY11]

JON BRUNING: Ready? Okay. Mr. Chairman, members of the committee, I'm Attorney General Jon Bruning, B-r-u-n-i-n-g. I'm here today to ask you to approve the budget deficit request for the Office of Attorney General. In discussions with the chairman and members of the committee, we have agreed to reduce our deficit request to the very minimum necessary to continue to handle the legal matters of the state. So we're asking for three things: (1) replace the \$200,000 vetoed by the Governor in 2007 from our General Fund for FY '09; (2) one additional tobacco settlement enforcement lawyer from the Nebraska Health Care Cash Fund; and (3) an additional OPS litigation source of money. We are withdrawing our request for a new civil litigation attorney and an HHS law clerk. So let me walk through these briefly; it will probably take five minutes is all. First, General Fund restoration 2007--in 2007 the Governor vetoed \$200,000 from the General Fund for both FY '08, FY '09 due to an increase in the state settlement cash fund. That's the money our office brings in from settlements with bad guys, nationally and statewide. The settlement cash fund increase did not include PSL. It's intended to be used generally for consumer-related purposes. The other thing about it is you can't count on it. It comes in sometimes but not all the time based on national settlements and so on. Ford rollover is the classic one I use--the Explorers rolling over, Ford settles with the Attorneys General in the 50 states. They pay everybody something. They pay Nebraska 300,000 bucks. It comes in but you can't count on those monies coming in. So the veto reduced our base budget going forward with no permanent replacement of

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these funds. We absorbed it in '08 rather than fight about it because we didn't fill the position held by Chief Deputy Dave Cookson. He moved over to Chief Deputy. We delayed filling the position for awhile. He doesn't make \$200,000 obviously, but that and some other things we were able to absorb it. He wishes he made \$200,000 as do all of us. So that's how we managed to do it. We're not in a position to absorb this thing in FY '09 without some level of retrenchment. This comes at a time when the number of high-profile and complex legal challenges continues to increase. We've got health insurance litigation, liquor control litigation, tons of water litigation just to name a few. So we are asking you to restore the \$200,000 vetoed by the Governor for FY '09. Along with that restoration, we're asking for PSL in the amount of \$108,000 to increase salaries to keep our agency's salaries in the ranges agreed to by the state. And NAPE...the attorneys of the Attorney General's Office are not covered by NAPE, as you know, but we often compete unsuccessfully with our client agencies covered by NAPE. Maybe the most serious challenge we face in our office is retaining the highly qualified attorneys that we now have. Thankfully, our attorneys are dedicated public servants. But when the pay is too great, it becomes very hard to keep qualified and outstanding attorneys, especially when we can't compete with other government agencies. So last year we lost 12 attorneys. How'd we lose them? These are happy people by the way. These are not people that leave because they don't like what they're doing. Jodi Fenner went to HHS; Terri Nutzman-Buller went to HHS; Jen Tomka went into private practice. These are some of our top people. They were all three highly experienced women who we could count on to handle the complex cases we now see on a regular basis. You could give them anything. I mean they were doing top-notch work. Within the last few years, Governor Heineman has appointed two of our mid-range attorneys to be judges, and, of course, they're going to leave and do that. This wasn't even our longest-serving, most qualified people like Dale Comer, for example, who's been around for 20-some years and we nearly lost Dale to the university. They were looking for a general counsel. So we quaked in fear as that potentially happened in the AG's Office, but we have to be able to compete salarywise. So the funding of this request will allow us to raise salaries so they're comparable to Nebraska state government attorneys around in other

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agencies and not lag further behind Lancaster County, Douglas County, Lincoln city attorney, Omaha city attorney. You can see here, this is updated, and this is us in red. These are average salaries. This is the city of Lincoln. This is the city of Omaha. This is Lancaster County, the public defender in yellow, and this is the Lancaster County Attorney, this is us. So you can see...I mean we've got a problem. And this is a problem I tried to remedy when I first came in. Senator Engel will remember in 2003 this was one of the first priorities I tried to fix. At that time, Senator Kruse, I think you were on the committee as well and, Senator Synowiecki, perhaps you were on the committee as well. It was one of those issues that we were very, very concerned about. And you can see this is us. I guess this would be attorney II position, slightly higher level position--same issue, we're at the bottom of the line. This is a supervisor, 10-plus years, you're looking at average salaries again: public defender, county attorney city of Lincoln, city of Omaha, with us at the bottom of the line. So Attorney General's Office has always been behind. Why is that? Don Stenberg made a decision when he was Attorney General for 12 years that he was going to have a flat budget, and I don't mean flat with inflation, I mean flat--same dollar amount in 1991 when he took office as it was in 2003 when he left, exact same. Imagine that. I mean it's, you know. And listen, if you're the Appropriations Committee and you're sitting in here and the Attorney General comes in and says, I don't want any more money, are you going to say, no, take some more money? Of course not. You're going to say, fine. You know, you're in charge of that agency, the people elected you, you make decisions. Well, I'm telling you it's worth it to the people of Nebraska to make sure we keep the Dale Comers around. Because if they leave and we represent them with Billy or Becky 25-year-old, you're going to see a big difference. You're going to see a big difference. Governors, people of all stripes in the Legislature rely on guys like Dale Comer or Dave Cookson to come in and so this. And so it is important that we have attorneys that have skill. I mean think about in your own worlds. Do you get better at something after 10 or 15 or 20 years? Of course you do. You're more skilled at your business or practicing law than you were before. So I humbly ask you please, this doesn't affect me. I get paid the same no matter what. This affects our ability to keep the best, which really is how we serve the taxpayers. So that's

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what this is all about. Number two, tobacco litigation attorney--this is a quagmire that represents tens of millions of dollars every year going to the Health Care Task Fund or the Health Care Fund. How much money are we talking about, Dave, that goes into that every year? [AGENCY11]

DAVE COOKSON: \$38 million. [AGENCY11]

JON BRUNING: \$38 million. What we're asking is for one attorney to make sure that when we get sued by the tobacco companies who say that we are not diligently enforcing against the nonparticipating manufacturers that we can defend ourselves. This is going to come out of the Health Care Fund. It's not...the fund that's paid for by tobacco money so this does not have any General Fund impact whatsoever. One new attorney--we want to make sure we can do the job. We've got two of our most experienced people working on it right now, but they're paid for out of General Funds mostly. They should be paid for out of this tobacco money so that's why we're asking for that amount of money. It is not any General Fund impact whatsoever. And finally, OPS litigation funding--as you know, or at least as I hope you know, we've been very diligent in trying to keep the cost of outside counsel down. It was one of the pledges I made when I came into this office. We've got to keep those costs down. There were a couple of just absolute financial tragedies that occurred during the low-level radioactive waste case. Attorney General Stenberg recused himself, nobody was minding the store, and the state spent \$22 million at \$750 an hour with a D.C. firm that was approved by an Omaha person and another person at DEQ, then the money just drained out of here as fast as it could. I mean it was an absolute sickening shame because he recused himself from the case. I think it was not the right decision, but that's water under the bridge. All I can control is now that I'm here we've kept outside counsel costs down by trying to do it inhouse with some of the best lawyers in the state. But I can tell you this thing is quite a mess. Here's some statistics for you--53 depositions, 975 requests for production, 1,000,831 pages of documents produced by both parties, 18 expert witnesses are designated by plaintiffs. OPS is funded by Susie Buffett's money. It is a never-ending

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pool of money at least from where we sit. She has more money than the state by and large. So they're not going to run out of money. So we need some outside counsel to fund this unless you want us to hire ten lawyers for a year or two. This begins...this trial begins in September of 2008. This is a case that has to be handled by outside counsel. There's no other way to do it because you can't say hire ten lawyers for a year and then fire ten lawyers when the case is done so we have to do it with outside counsel. So we are asking for \$1.2 million in General Funds to defend the state, defend the legislation that you have passed as a Legislature. And as I say, trial is scheduled to begin in September 2008. So that's it. David, have I forgotten anything? All right, Mr. Chairman, that's it. [AGENCY11]

SENATOR HEIDEMANN: Thank you very much. I think we do have some questions though. Senator Engel. [AGENCY11]

SENATOR ENGEL: Any chance that OPS will drop that? [AGENCY11]

JON BRUNING: We continue to hope. There's opportunities for that, but I think it's unlikely. I think it's unlikely. There are very passionate opinions on both sides. You know, people feel very strongly about children and the way to help them. I would be surprised if it was dropped at this point, especially when you don't have to pull...it's different. You're stewards of the taxpayers' dollars. They don't even really have to worry about that because with Susie Buffett, her willingness to write the checks, you know, that changes things. And I'm not trying to impugn her motives by the way. She cares about children. I have no doubt she cares about children just as much as any of us. It's just a difference of opinion on how it's going to happen. But I think we can all agree that she has a virtually unlimited ability to fund lawyers if she so chooses. [AGENCY11]

SENATOR ENGEL: Thank you. [AGENCY11]

SENATOR HEIDEMANN: In your first request, you had asked for \$14,074 and the

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second year \$59,165 for a school finance attorney. You're not asking for that anymore then. [AGENCY11]

JON BRUNING: No. We have withdrawn that request. [AGENCY11]

SENATOR HEIDEMANN: Okay. Senator Nelson. [AGENCY11]

SENATOR NELSON: Thank you for testifying. The \$200,000 that you'd like to have restored, would all of that, if you got it, would all of that be applied to salaries... [AGENCY11]

JON BRUNING: Yes. [AGENCY11]

SENATOR NELSON: ...of the Attorney General's staff and about how many do you have? [AGENCY11]

JON BRUNING: About 60 attorneys and about 60, give or take, support staff. [AGENCY11]

SENATOR NELSON: So would you be selective about that or kind of prorate it across the board? [AGENCY11]

JON BRUNING: We have tried to make it a meritocracy, Senator. It is very much a meritocracy. We have done some minimum level across the board, but Jodi Fenner, for example, she was a young, highly, highly talented attorney. We made her the chief of the agriculture and natural resources section, just plucked her out of, I don't want to say obscurity, but she was an Attorney I and we could see her skill, David could, and we plucked her out and made her a supervisor. Well, then HHS saw her and they stole her from there. So I mean it's very much a meritocracy I think. Tom Stine, who runs our civil bureau, was a line lawyer at the Department of Roads. And I saw his handling of the

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Seward bus crash, which was a very delicate case, we had some children die, some injuries, we had to settle those. You had to value the life of a child. It was a very, very difficult case to handle, and he handled it extremely deftly and that was at least in large part why we made him chief of the civil bureau. So I believe we're running a meritocracy. So I think, I guess, in answer to your question they'll be applied based on who we need to give a raise to to keep. I mean I had more than a little hand wringing about Dale Comer leaving. And I can tell you I'm not the only one. You got Larry Bare who was...I mean there's many of us who have worked with him saying what's the state going to do? The guy has a lot of knowledge that's important to keep and is paid much, much less than his peers who not only are in private practice but chose to, you know, his peer at the county attorney's office is making \$30,000 a year more. [AGENCY11]

SENATOR NELSON: Thank you. [AGENCY11]

SENATOR HEIDEMANN: Senator Harms. [AGENCY11]

SENATOR HARMS: Jon, in regards to the OPS and you're going to contract that out, are you looking for just one attorney or are you going to have more than one attorney, are you looking at a firm? And then I'm assuming this firm or this attorney will be specialized in public school litigation. [AGENCY11]

JON BRUNING: Senator, when this...when the school finance litigation, and this is kind of the third or fourth iteration of several of these cases began, we sat down with Senator Raikes, who at the time, of course, and remains Chairman of the Education Committee, Governor Johanns, and Speaker Bromm, so this was in 2003, and we interviewed...we basically had a Bake-Off. And the decision is the Attorney General's to make, but I decided it would be better made with the involvement of the legislative and other parts of the executive because of the amount of money we were getting ready to spend. And so Senator Raikes, Speaker Bromm, Governor Johanns, and I sat in a room and had this Bake-Off. Fraser Stryker Law Firm of Omaha, Mark Laughlin being the main point

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man, won that Bake-Off. And they were extremely skilled, showed a great deal of knowledge, and since then have really proven their mettle along the way. So Mark Laughlin does a fabulous job. I think everybody that's watched him has recognized he has been very, very skilled. We have won some parts of these cases that we didn't expect to win that nationally other states have lost, similarly situated states have lost. So Fraser Stryker is the firm out of Omaha and they have done an outstanding job.
[AGENCY11]

SENATOR HARMS: Will \$1.2 million actually cover that? [AGENCY11]

JON BRUNING: I think it will. I mean we tried to make it reasonable, not inflate it at all or tried to make it reasonable, but it is expensive. When they're doing that many depositions, the other side, if it's any consolation, I know it's little consolation, the other side is spending two to three times as much as we are so we think we're getting a good bang for the buck. They're spending a lot of money. They have...we'll have one...and we watch very, very carefully. I mean David Cookson managed the Republican River lawsuit, which had outside counsel and outside experts. We spent about \$1 million in that, which seems like a lot. But when you think about the other side was spending tens of millions or on low-level we spent \$24 million, a million is a bargain. We look at their bills; we nickel them on their bills. We make it very clear to them this is the taxpayers' money and has to be spent frugally. And I think they do as good a job as we could ask.
[AGENCY11]

SENATOR HARMS: In regard to the tobacco cigarette tax, how much litigation do you have on that particular area? Do you need an attorney to do that? Do you have that many? [AGENCY11]

JON BRUNING: We do. We have filed, in fact, we just filed a lawsuit last week that was covered by the media against an Indian tribe that was an NPM, nonparticipating manufacturer. When they sign the initial agreement with the tobacco companies, the

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participating manufacturers, part of that was that they said you must enforce against other tobacco companies that try to sell in Nebraska and get them to pay in an equivalent amount. So the main tobacco companies paid in X dollars, the nonparticipating manufacturers, the goal with this agreement was to make them pay in similarly based on their sale of cigarettes. And so just last week we filed and that's routine. We filed I would say a dozen lawsuits, but most importantly to protect our \$39 million a year that we get from the tobacco companies, we have to be seen as diligently enforcing. And that's in the eyes of the courts. And diligent enforcement is a nefarious concept that we've tried to negotiate out of. It seemed like a good idea to the Attorneys General in '99 when they carved out this deal. I wasn't here. They hate it now because they realize that means it's whatever a judge thinks--diligent enforcement. And so we have...if we don't file against that little Indian tribe that sells, you know, 20,000 cartons of cigarettes or some nominal number in Nebraska, if we don't file and Phillip Morris sees that, they'll come in here and say Nebraska didn't diligently enforce. We're not paying our share of the \$39 million. So the big bucks are at risk based on the little actions of diligent enforcement. [AGENCY11]

SENATOR HARMS: So how many did you say you probably would average a year in that particular area of tobacco? [AGENCY11]

JON BRUNING: Oh, how many lawsuits do you think... [AGENCY11]

DAVE COOKSON: Probably two to three. [AGENCY11]

JON BRUNING: Probably two to three, but it is a never...I'm telling you, Senator, I got on the tobacco committee of the Attorneys General for awhile, it is a never-ending battle. We had a couple Attorneys General I guess were spending 40 to 50 percent of their time on tobacco. It is a massive...because the states have...it sounded like such a great idea, but essentially we have...it's almost like a drug now. The states need it. Appropriations committees have figured out how to spend it; 40 million bucks a year is a

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lot of money and now we're relying on it. And if the ball gets dropped, we're all going to be...I mean \$40 million a year the states are reliant. Now you have been smarter than many states where they have paid for roads and they have paid for...they just built it right into the general fund. This Legislature has been smarter than other states because some states actually took a cash payment and used it as almost basically sold bonds. Can you imagine? Give us a billion dollars and we'll pledge our tobacco money against it? Well now there's some real pressure on the Attorney General to make it work. So we're just saying we feel like we're a little bit on the edge right now as far as our diligent enforcement. I worry. It would be a massive blunder if we were to not be seen as diligently enforcing by one judge. Forty million dollar a year roll of the dice is what it is. [AGENCY11]

SENATOR HARMS: Thank you. [AGENCY11]

SENATOR HEIDEMANN: Senator Wightman. [AGENCY11]

SENATOR WIGHTMAN: Jon, on the tobacco fund, you're asking for an additional I guess \$17,000 the first year and \$75,000 the second. Is that right? [AGENCY11]

JON BRUNING: Yes, sir. [AGENCY11]

SENATOR WIGHTMAN: How much of the total budget for that area right now (inaudible)? [AGENCY11]

JON BRUNING: Do you know what the total budget for that area is? [AGENCY11]

_____: I think it's roughly 150... [AGENCY11]

DAVE COOKSON: It's 250 a year is our spending authority. [AGENCY11]

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JON BRUNING: Two hundred fifty thousand a year is our spending authority, Senator.
[AGENCY11]

SENATOR WIGHTMAN: What about the school litigation, school finance litigation? Now you're asking for \$1.2 million. What's the overall budget or how much are we spending a year without that? [AGENCY11]

JON BRUNING: I would say we spent more than that last year. Do you know, Mark? []

MARK PEDERSEN: For this biennium it was \$2.5 million for the biennium, and that was all given in FY '08. [AGENCY11]

JON BRUNING: Two point five million was given for the biennium in FY '08, and I would say we spent, I mean we were spending \$300,000 a month, \$400,000 a month with the law firm. And that doesn't include Dale spending a significant amount of his time and others in the office... [AGENCY11]

DALE COMER: Three at this point (inaudible). [AGENCY11]

JON BRUNING: Three people within the office spending...we're trying to manage it from inhouse so the law firm is not just running out spending money. We tell them what they can and can't do. And part of that has to be the massive production of documents just looking through the 1.8 million pages of documents before they are produced.
[AGENCY11]

SENATOR WIGHTMAN: And the \$1,200,000 is primarily for outside litigation...
[AGENCY11]

JON BRUNING: Yes, sir [AGENCY11]

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SENATOR WIGHTMAN: ...plus cost of deposition, travel costs, but not all attorneys I guess. [AGENCY11]

JON BRUNING: That's right. [AGENCY11]

SENATOR HEIDEMANN: Senator Nantkes. [AGENCY11]

SENATOR NANTKES: Hi. Thanks for being here, Mr. Attorney General. [AGENCY11]

JON BRUNING: Yes. [AGENCY11]

SENATOR NANTKES: A couple of questions in relation to the school finance issues that you bring before this committee. You mention that these are already the second and third generation of school finance cases that we've seen. And I guess I'm wondering, and it probably won't be the last, if it wouldn't make more sense for your office and this committee to follow suit with the idea if possible to develop some expertise inhouse instead of continuing to contract out state dollars to law firms? And believe me, this is nothing against Fraser Stryker and Mark Laughlin. I know Mark Laughlin. I think he's a fantastic attorney and is probably doing the state a great, great service. But that just occurred to me as you were visiting about this request, and I was wondering if you could address that. []

JON BRUNING: I think it's a reasonable thought. I think Mark Laughlin would say the same thing himself. I mean we have...it's not a bad idea. I mean it gets...I don't know what Mark Laughlin makes. I'm not sure we could get a Mark Laughlin in here. I'm guessing he makes, you know, a lot of money, \$300,000, \$400,000. But could you get somebody? I mean we do have guys that are that skilled like Dale that make a third of that, right, that make around \$100,000. Could we get a really skilled attorney for that? Sometimes, yeah. I mean they have to have kind of a public service side to them where it's more than the money to them, but it's possible. There are those people out there.

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And that's, by the way, why we're...I mean that's a nice segue why we are asking for the \$200,000. Why are we asking for the money? If we can't pay the mid-level people who are someday going to be a Dale Comer enough, I mean if we're paying...when I got here, Cookson, who was a senior partner in an Atlanta law firm making \$350,000, when I got here you were paid like \$52,000 or something by Stenberg? [AGENCY11]

DAVE COOKSON: I paid more in taxes (inaudible). [AGENCY11]

JON BRUNING: \$52,000 by...now why, right? Well, because he had a child back here and he wanted to be near his child and, you know, he wanted to be with his son and that was it, right? His wife and son were here and that was the deal. Why go from \$350,000 to \$50,000? That's why. So do I think we could build some expertise? I'd like to. I mean it's challenging with the budget we're under. And make no mistake about it. I know we're the state. I understand I'm on the state's team and we don't get to pay people \$300,000. I'm not asking you for that. I'm just saying we're getting the heck beat out of us still. We started to get a little closer there in '03 and '04 and then we kind of lagged behind again. So I would think we could try. I've seen some pretty special people apply. They continue to apply. I'm amazed at the people that come in. We just hired a guy the other day who was a Supreme Court clerk, superstar, I don't know, we're paying him in the 40s or something. I mean it's, you know, in the 40s. I mean this guy could...so there are some people who just love public service. [AGENCY11]

SENATOR NANTKES: Can I ask one more question? [AGENCY11]

SENATOR HEIDEMANN: Yes. [AGENCY11]

SENATOR NANTKES: This is on an unrelated note, but I'm sure as many of my colleagues are aware and as your office is that there is an impending...there is considerable amount of attention being given to the home foreclosure issues around the country right now. And I'm wondering if your office has any ideas in terms of how we

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can address that on a state level, particularly in line with the consumer protection duties of your office and if you had any thoughts about that that you could share with the committee. [AGENCY11]

JON BRUNING: Yeah. Mr. Chairman, we did not set this up in advance, but, Senator, I would love to talk to you off-line about that. I mean we could talk about it a little bit now, but I think it will be fairly in-depth as well. I would love to do something about that. I mean many of my colleague Attorneys General are doing...in fact, the conversation I had had--Cookson is smiling here because I had asked David, I said, why don't we go to the Appropriations Committee and ask for some of the settlement money that's just sitting in a pot over there to use for foreclosure...to use to help people that are in foreclosure. And the analysis we came to because this discussion, I was going to El Salvador to work on the gang thing and this was Wednesday, he said, I don't think you want to drop this on them with a day to go. And I said, I think you're right. I'm not sure we want to just keep changing our request. It's not...the ship of state is not quite that nimble to turn. But I think it's a great idea and I think we should think about it and I would love to think about it because there are people that are really hurting and we could do something with it. And that settlement money is there and that's what it's there for--that consumer money that comes in--that's exactly the vision I have for it is to help consumers in that fashion. We settled with Ameriquest and brought \$425,000 in. What do you do with the money? Well, we try to help consumers from being, you know, victims basically of thieves of their credit--people who get them to sign up for mortgages they can't afford. I would love to talk to you about that, Senator. [AGENCY11]

SENATOR NANTKES: Okay, thanks. [AGENCY11]

SENATOR HEIDEMANN: Are there any other questions? Seeing none, thanks for coming in today, Jon. [AGENCY11]

JON BRUNING: Thank you, Mr. Chairman. [AGENCY11]

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SENATOR HEIDEMANN: Is there anyone else wishing to testify on Agency 11, the Attorney General? Seeing none, we will close the public hearing on Agency 11 and open up the public hearing on Agency 46, Department of Correctional Services.

[AGENCY11]